Procuring Goods and Services Using Community Access Program Grant Funds[1]

Prepared for the Health Resources and Services Administration

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I. INTRODUCTION AND EXECUTIVE SUMMARY

The Community Access Program ("CAP") affords public and non-profit health care providers an opportunity to establish and support improved integrated health care delivery systems serving the uninsured and underinsured within their communities. As a result of the program, providers across the country are developing much needed infrastructure to improve the quality and efficiency of primary and specialty health care services and expand access to these services through ambitious plans that typically involve additional services in areas such as case management, outreach and the integration of information systems. In almost every instance, CAP consortia are entering into sizeable and long-term contracts for goods and services that will allow them to accomplish their goals under the program.

This issue brief outlines the federal requirements that must be observed when a CAP consortium procures goods or services for its use which are paid for with CAP grant funds. In particular, Section II of this issue brief discusses the general, administrative and contractual requirements set forth in Office of Management and Budget Circulars A-110 and A-102, which are applicable to non-profit organizations and to State and local governments, respectively, when procuring goods and services with federal grant funds. Additional requirements, discussed in Section II-D, apply when procurements are expected to exceed $100,000.

Section III of the issue brief looks beyond the specific requirements of the federal procurement standards and discusses terms and conditions that, as a matter of good practice, ought to be included in any contract for goods and services. This Section focuses on elements that generally make up a "sound and complete" contract, as is required under the applicable federal procurement standards.

In recognition of the many CAP consortia that feature an electronic exchange of information among their members, this issue brief concludes in Section IV with a discussion of some of the special considerations that are relevant to the procurement of information system hardware and software. Issues addressed in this Section include bids and proposals, warranties, indemnification, customizations, software licensing agreements and maintenance agreements.

II. FEDERAL PROCUREMENT STANDARDS

The federal government has established certain requirements that grant recipients must adhere to when procuring goods or services paid for with federal grant funds. These requirements apply when the cost of the item or service procured is treated as a direct cost of the grant award, *e.g.*, consultant contracts, equipment purchases.[2] The requirements are published

[2] In some instances, CAP grants are awarded to the CAP consortium as an entity. In others, the grant is made to a member of the consortium. The federal procurement standards apply to the entity that is the direct recipient or sub-recipient of a grant award and that is using grant funds to purchase goods or services. The terms "grantee," "recipient," and "purchaser" are used interchangeably throughout to refer to that entity.

by the Office of Management and Budget ("OMB") in Circular A-110 for non-profit organizations and in Circular A-102 for State and local governments. The Department of Health and Human Services ("DHHS") has implemented these circulars in regulations codified at 45 C.F.R. Part 74 (nonprofit organizations) and at 45 C.F.R. Part 92 (State and local governments). These regulations contain the minimum administrative and procedural standards that grantees must follow when procuring goods and services with federal grant funds, and mandate that all procurement contracts contain certain clauses. Additional requirements apply when the procurement is expected to exceed $100,000 in value.

The following is an outline of the basic federal procurement requirements. CAP grantees are advised to consult the Part 74 or Part 92 regulations, as appropriate, for information concerning specific procurement issues.

A. General Requirements

Grantees must comply with the following requirements for all procurements paid for with federal grant funds:

1. The procurement must be conducted in a manner to provide, to the maximum extent practical, open and free competition. Part 92, applicable to State and local governments, sets forth some of the situations considered to be restrictive of competition:

   (i) Placing unreasonable requirements on firms in order for them to qualify to do business;
   (ii) Requiring unnecessary experience and excessive bonding;
   (iii) Noncompetitive pricing practices between firms or between affiliated companies;
   (iv) Noncompetitive awards to consultants that are on retainer contracts;
   (v) Organizational conflicts of interest;
   (vi) Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance of other relevant requirements of the procurement; and
   (vii) Any arbitrary action in the procurement process.

   In contrast, Part 74, which is applicable to non-profit organizations, does not provide examples of situations that are considered restrictive of competition. Nevertheless, non-profit organizations should follow this guidance because these situations are often cited to define what is not "open and free competition," a requirements for procurements under Part 74.
2. Awards must be made to the bidder or offeror whose bid or offer is responsive to the solicitation and is most advantageous to the grant recipient, price, quality and other factors considered.

3. Solicitations must clearly set forth all requirements that the bidder or offeror must fulfill in order for the bid or offer to be evaluated by the grant recipient.

4. Contractors that develop or draft grant applications, or contract specifications, requirements, statements of work, invitations for bids and/or requests for proposals, cannot compete for those procurements.

5. Some form of cost or price analysis must be made and documented in the procurement files in connection with *every* procurement action. (Price analysis may include comparison of prices submitted, market prices, and similar indicia, together with discounts. Cost analysis means the review of each element of cost in terms of reasonableness, allocability, and allowability under federal cost standards.)

6 The grant recipient may reject any and all bids or offers when it is in the recipient's best interests to do so.

7. Recipients are expected to be alert to organizational conflicts of interest and noncompetitive practices among contractors that may restrain trade.

B. Administrative Requirements

The procurement standards require grantees to have certain policies and administrative procedures in place for all procurements. These include:

1. *Written* procurement procedures that, at a minimum, provide for:

   a. avoiding the purchase of unnecessary or duplicative items;

   b. where appropriate, an analysis of lease and purchase alternatives to determine which would be most economical and practical for the recipient and the federal government;

   c. solicitations for goods and services that contain:

      (1) a clear and accurate description of the requirements for the material, products or service to be procured which, with respect to competitive procurement, may not unduly restrict competition;

      (2) requirements that the bidder/offeror must fulfill and all other factors to be used in evaluating bids or proposals;

(3) whenever practical, a description of technical requirements in terms of functions to be performed or performance required, including the range of acceptable characteristics or minimum acceptable standards;

(4) the specific features of "brand name or equal" descriptions that bidders are required to meet when such items are included in the solicitation;

(5) acceptance, to the extent feasible, of products and services dimensioned in the metric system of measurement;

(6) preference, to the extent practicable and economically feasible, for products and services that protect the environment, conserve natural resources, and are energy efficient.

d. as to State and local governments only, written procurement procedures must also provide for obtaining more economical purchases through the consolidation or breaking out of purchases.

2. Recipients are expected to make "positive efforts" to utilize small businesses, minority-owned firms, and women's business enterprises, whenever possible. Recipients are required to take *all* of the following steps toward this goal:

a. ensure that small businesses, minority-owned firms, and women's business enterprises are used "to the fullest extent practicable;"

b. make information on forthcoming opportunities available and arrange time frames for purchases and contracts to encourage and facilitate participation by small businesses, minority-owned firms, and women's business enterprises;

c. consider in the contracting process whether firms competing for larger contracts intend to subcontract with small businesses, minority-owned firms, and women's business enterprises;

d. encourage contracting with consortiums of small businesses, minority-owned firms, and women's business enterprises when a contract is too large for one of these firms to handle individually; and

e. use the services and assistance, as appropriate, of the Small Business Administration and the Minority Business Development Agency in the solicitation and utilization of small businesses, minority-owned firms, and women's business enterprises.

3. Recipients must use the type of procuring instrument (*e.g.*, fixed price or cost reimbursable contracts, purchase orders, incentive contracts) appropriate to the particular procurement and for promoting the best interests of the project

involved. "Cost-plus" contracts may not be used. The federal cost principles (*i.e.*, OMB Circular A-87 or OMB Circular A-122) govern what costs are allowable under cost-type contracts.

4. Contracts may be made only with responsible contractors who possess the potential ability to perform successfully under the terms and conditions of the proposed procurement. This requires consideration of contractor integrity, record of past performance, financial and technical resources or accessibility to other necessary resources. Contracts cannot be made with contractors suspended or debarred from participating in federal contracts or awards.

5. Grant recipients must make available to the DHHS awarding agency, upon request, for pre-award review procurement documents such as requests for proposals ("RFP"), independent cost estimates, *etc*., if the recipient's procurement procedures fail to comply with the federal procurement standards.

6. Recipients must maintain a system of contract administration that ensures contractor conformance with the terms, conditions, and specifications of the contract. Recipients must evaluate contractor performance and document, where appropriate, whether contractors have met the terms and conditions of the contract.

7. Recipients must maintain "written standards of conduct" governing employees engaged in the award or administration of contracts. An organization's standards of conduct must have the following features:

   a. employees, officers, or agents may not participate in the selection, award, or administration of a contract if a real or apparent conflict of interest exists, *e.g.*, the individual or any member of their immediate family, his or her partner, or any organization that employs or is about to employ any of the foregoing has a financial or other interest in the firm selected for the award. However, the recipient may set standards for situations in which the financial interest is not substantial.

   b. officers, employees, and agents of the recipient may not solicit or accept gratuities, favors, or anything of monetary value from contractors or subcontractors. However, a recipient can set standards permitting acceptance of unsolicited items of nominal value.

   c. the written standards of conduct must provide for disciplinary actions for violations of the standards. Part 92 further provides that the awarding agency may provide additional prohibitions relative to real, apparent, or potential conflicts of interest.

8. Part 92 additionally requires recipients that are State and local governments to maintain records sufficient to detail the significant history of a procurement, including, but not limited to, documenting the rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price. Because such documentation is a good procurement practice, non-profit organizations should follow this guidance for procurements over the simplified acquisition threshold and for any contract awarded without open and free competition.

C. Contract Provisions

All contracts and subcontracts for the procurement of goods and services must contain the following provisions:

1. Provisions that define a "sound and complete" contract.

2. Provisions requiring compliance with federal anti-discrimination statutes.

3. Certain provisions required by law (37 C.F.R. Part 401) protecting the federal government's rights to patents or inventions if the contract is for the performance of experimental, developmental or research work.[3]

4. With respect to contracts and subcontracts entered into by State and local governments only (*i.e.*, entities subject to 45 C.F.R. Part 92), additional provisions are required:

   a. a provision that gives the recipient, DHHS, the General Accounting Office, or any of their duly authorized representatives, access to any books, documents, papers, and records of the contractor which are directly pertinent to a specific program for the purpose of making audits, examinations, excerpts and transcriptions. Non-profit organizations must include such provisions only if the contract or subcontract exceeds the small purchase threshold. *See* discussion in Sections II-D & E, below.

   b. with respect to all contracts in excess of $10,000, a provision authorizing termination for cause and for convenience by the State or local government, including the manner by which it will be effected and the basis for settlement.

   c. notice of awarding agency requirements and regulations pertaining to reporting and to copyrights and rights in data.

[3] A discussion of mandatory contract provisions not relevant to CAP grants, *e.g.*, construction contracts, is omitted from this issue brief.

d. a provision that requires retention of all records for three years after final payments are made and all other pending matters are closed.

e. a provision setting forth mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act.

D. Small Purchase Procedures

Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies or other property that do not cost more than the simplified acquisition threshold. The "small purchase threshold" is set by statute, 41 U.S.C. § 403(11), and may increase from time to time. It is currently set at $100,000. If small purchase procedures are used, price and rate quotations shall be obtained from an adequate number of qualified sources.

E. Requirements for Contracts in Excess of $100,000

There are additional requirements for procurement contracts that are expected to exceed the "small purchase threshold." For such contracts, *all* of the following *additional requirements* apply as well:

1. Procurement records and files must, at a minimum, include:

   a. the basis for the contractor's selection;

   b. a justification for lack of competition when competitive bids or offers are not obtained;

   c. the basis for the cost or price of the award;

   d. a grant recipient must, *if requested* by DHHS, provide procurement documents such as requests for proposals, invitations for bids and independent cost estimates for DHHS pre-award review if:

      (1) the procurement will be awarded without competition or only one bid or offer is received in response to a solicitation;

      (2) the procurement specifies a "brand name" product;

      (3) the proposed award is to be made to other than the apparent low bidder under a sealed bid procurement process;

      (4) a contract modification increases the amount of the contract by more than $100,000.

2. Procurement contracts that exceed $100,000 must, in addition to the requirements noted above, contain the following:

   a. provisions or conditions that allow for administrative, contractual, or legal remedies in instances in which a contractor violates the contract terms and provide for such remedial actions as may be appropriate;

   b. suitable provisions for terminating the contract, including the manner by which termination shall be effected and the basis for settlement;

   c. provisions describing the conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor;

   d. all negotiated contracts must include provisions giving the recipient, DHHS, the General Accounting Office, or any of their duly authorized representatives, access to any books, documents, papers, and records of the contractor which are directly pertinent to a specific program for the purpose of making audits, examinations, excerpts and transcriptions. Note that, with respect to State and local governments, this requirements is applicable to all contracts, regardless of the contract amount;

   e. provisions insuring compliance with the Clean Air Act and the Federal Water Pollution Control Act;

   f. provisions insuring compliance with the Byrd Amendment's restrictions on lobbying (*see* 45 C.F.R. § 93);

   g. provisions requiring certification prior to the award that a contractor is not suspended or debarred from participating in federal awards.

F. Non-Competitive, Sole-Source Awards

Part 92, applicable to State and local governments, specifically addresses procurement by *noncompetitive proposals*. Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate.

1. Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies:

   a. The item is available only from a single source;

b. The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;

c. The awarding agency authorizes noncompetitive proposals; or

d. After solicitation of a number of sources, competition is determined inadequate.

2. Recipients should be prepared to submit the proposed non-competitive procurement to DHHS for pre-award review upon request by DHHS.

There is no comparable provision in Part 74 governing procurement by recipients that are non-profit organizations. Nevertheless, because the above requirements are often considered fundamental parts of a sound procurement system, non-profit organizations should consider adopting them in their own procurement procedures.

III. CONTRACT TERMS AND CONDITIONS

There are certain features that are common to cogent and enforceable contractual arrangements which, as a matter of good practice, CAP grantees should include in procurement contracts. Moreover, as noted above, the federal procurement standards require contract provisions that define "a sound and complete" contract. The elements of a good contract are outlined below.

1. Description of Services and/or Products. This is the most important element of any contract, and the part which CAP grantee personnel are typically best equipped to address. Who knows more about precisely what service or product the consortium wants to purchase than the consortium itself?

In developing the description of services (the "Scope of Work"), it is critical to provide as much detail as possible under the circumstances. There will, or course, be situations in which the CAP consortium will prefer to retain flexibility, for example, by generally authorizing performance while indicating that a detailed task order will be issued to the vendor prior to the vendor proceeding with any specific activity. In most instances, however, the consortium knows in advance what it expects from the vendor. Putting these expectations on paper, in detail, is an important means to avoid disputes and potential lawsuits. The more complete and accurate an expression of the parties' expectations – a true reflection of their "meeting of the minds" – the less likely there will be confusion later as to whether or not performance was satisfactory. The following topics should, as relevant, be addressed in the Scope of Work:

a. **Description of Deliverables.** If the contract calls for the development of reports or manuals, what topics are to be covered? Approximately what length? For what kind of audience? Must drafts be submitted to the CAP

consortium? When? Must the vendor incorporate consortium comments into the final product?

b. **Quantities.** Unless the contract is "fixed price" for a particular deliverable, quantify the number of hours or days the contractor is authorized to work, the units of service or products to be delivered, estimated pages, *etc.*

c. **Deadlines.** Set specific deadlines and require timely delivery. Be prepared to monitor and enforce them!

d. **Key Persons.** If there are key persons that the grantee expects to work on the contract, they should be identified by name (preferably) or at least by function. The contract should specify that prior approval of the grantee is required for the vendor to replace or reduce the time committed to the contract by a key person, with failure to obtain such approval being a ground to terminate the contract.

e. **Minimum Qualifications.** If the vendor must have a particular skill, educational degree, license or permit, the contract should describe the required qualification(s).

2. Insurance. If a particular type of insurance coverage (*e.g.*, malpractice, automobile) is required for the CAP-funded project, the contract should specify the coverage (including coverage amount). It also is advisable to require the vendor to provide evidence of coverage in order to verify the coverage. For cost-type contracts, CAP recipients should consult the applicable Federal government cost principles (*i.e.*, OMB Circular A-87 or OMB Circular A-122) to determine if the cost of the insurance coverage is an allowable cost.

3. Payment Ceiling. Consultant and other contracts for services should specify a ceiling on how much the CAP grantee will pay for the service, unless the contract is for a fixed price, and require the CAP grantee's written prior approval before the vendor may exceed the ceiling.

4. Budgets and Budget Revisions. If the vendor's proposal included a proposed budget, the budget (after negotiation and agreement of the CAP program) should be incorporated in the contract. Further, the contract should require the CAP grantee's prior written approval for any changes in the budget, particularly any changes that would increase the cost of the contract.

5. Method and Timing of Payment. The contract should specify whether the vendor will be paid an advance and, if so, the amount.

The contract also should specify how often the vendor will be paid and the documentation required for payment (*e.g.*, proof of satisfactory progress on the work, invoices for expenses to be reimbursed, *etc.*). If the contract includes a budget, payment should be conditioned upon a demonstration that the amounts billed are within the budget and, if relevant,

allowable in terms of other restrictions that may apply, *e.g.,* federal cost principles, hourly rates, *etc.* If "time is of the essence," CAP grantees might consider tying payment in full to the percentage of the activity which is completed on time. Penalties might be imposed for any delay. In addition, the federal government does not allow grantees to draw down funds in advance of actual cash need and therefore expects grantees in contract dealings to minimize advance payments.

Finally, most CAP grantees' ability to pay a vendor for services will be contingent on the receipt of funds awarded under their CAP grant. Accordingly, it is advisable to insert the following provision into procurement contracts:

> Continuation of this contract and payment hereunder is contingent upon the availability of funds awarded to [CAP grant recipient] by the Department of Health and Human Services. [CAP grant recipient] will promptly notify contractor if DHHS suspends or terminates payment.

6. Recordkeeping and Retention. The contract should specify any records that the CAP grant recipient wants the vendor to keep. Depending on the type of contract, these may include contemporaneous time records or records of expenses charged to the contract.

It is important to keep in mind that federal regulations (45 C.F.R. § 74.53; 45 C.F.R. § 92.43) require grant recipients to retain financial records, supporting documents, statistical records, and all other records pertinent to the grant award for a period of three years from the final expenditure report. If an audit, claim, litigation, or a financial management review is started before the end of the three year period, the records must be kept until the litigation, claim, or audit findings have been resolved. Accordingly, CAP grantees must insure that procurement contracts require vendors and their subcontractors to keep records related to their work for at least three years from receipt of final payment.

7. Access to Records. CAP grantees should consider whether a particular procurement is the kind of arrangement under which it wants the ability to inspect the vendor's records pertaining to the contract. If so, the contract should include a provision allowing the CAP grantee's representatives access to the pertinent records upon reasonable notice and at reasonable times. As noted above, the procurement standards state that all contracts entered into by State and local government and all contracts in excess of $100,000 for non-profit organizations must have a provision allowing representatives of the recipient, DHHS and GAO access to the contractor's records.

8. Reporting. Progress reports may be useful means of ensuring that the vendor is performing satisfactorily. They can provide an early warning signal that the contractor is not performing as expected, allowing the parties time to agree on corrective action or signaling to the grantee that termination may be warranted before more time and money are expended. If progress reports are required, the contract should specify how and when they must be submitted.

9. Confidential and Proprietary Information. If the vendor will have access to personal information about patients or employees of the grantee, the contract should include a provision requiring the vendor to protect that information from unauthorized disclosure. Keep in mind that the privacy standards required under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") require health care providers to include privacy protection provisions in contracts with "business associates," *i.e.*, vendors providing services to or for the benefit of the provider. *See* CAP Issue Brief dated March 1, 2001, for more information on the federal privacy standards.

In addition, if the vendor will have access to proprietary information of the CAP grantee, *e.g.*, business plans, marketing surveys, computer programs, *etc.*, the contract should include provisions prohibiting the vendor from releasing such information to third parties without the grantee's prior written approval and requiring the vendor to return it to the grantee upon termination or non-renewal of the contract.

10. Copyrights. If the vendor will produce or contribute to copyrightable material (*e.g.*, practice manuals, treatment protocols, computer programs) under the contract, it is very important to specify which of the parties will own the copyright and any rights that the other party may have to the material, *i.e.*, the right to use, reproduce, or authorize others to use it and any royalties to be paid for those rights. Note that while federal grant regulations permit grantees to copyright any work that is subject to copyright and was developed under a CAP grant award, DHHS retains a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use the work for federal purposes and to authorize others to do so. *See* 45 C.F.R. § 74.36; 45 C.F.R. § 92.34.

11. Suspension and Termination. The federal procurement standards outlining remedies for the vendor's breach of the contract vary according to the type of grantee and do not in all instances require procurement contracts to provide for appropriate remedies in the event of breach. It is good practice, however, to have such provisions in all procurement contracts because of the protection they afford to the grantee. Suspension and termination are the most common remedies for nonperformance. "Suspension" (or a "stop work" order) is the temporary withdrawal of a vendor's authority to proceed under the contract during the contract period; "termination" is the permanent withdrawal of such authority.

Suspension can be an effective remedy in an emergency situation (*e.g.*, the vendor is sixty days behind on a six-month contract in which "time is of the essence"). A grantee may reserve the right, in its sole discretion, to suspend the contract *immediately* (without prior notice) to give it time to determine whether to permit the vendor to take corrective action or to terminate the contract. It is crucial that the contract explicitly give the grantee complete discretion to suspend immediately in order to avoid disputes over whether the suspension was appropriate or not.

Obviously, termination is appropriate when there is no hope that the vendor's breach can be corrected to the grantee's or consortium's satisfaction. There are several approaches to

termination clauses. One allows either party to terminate for any or no reason "on _____ days' prior notice" to the other party. While this approach may provide an easy "out" for a grantee, a grantee must consider whether it can afford to allow the vendor to walk away midstream.

A second approach permits either party to terminate the contract "for cause." Typically, this includes a list of circumstances that constitute "cause" and a written notice by a party of the existence of such a circumstance. The contract may or may not provide the alleged breaching party with a period of time to correct its performance before the contract may be terminated.

A third approach (typically included along with the first or second) permits the parties to terminate "for convenience," when both parties agree that there is nothing to be gained by proceeding with the contract. As discussed above, Part 92, applicable to State and local government recipients (including any agency or instrumentality of a local government), requires that all contracts in excess of $10,000 include a provision authorizing termination for cause and for convenience by the State or local government, including the manner by which it will be effected and the basis for settlement.

Finally, as noted above, CAP grantees should be sure to include a provision allowing automatic suspension or termination if the CAP grantee's grant is suspended or terminated.

12. Indemnification. It is advisable to include a comprehensive indemnification provision stating that the vendor will defend and hold the grantee harmless for any and all claims or losses, including attorneys fees and expenses, incurred by the grantee and/or any third party, arising out of the vendor's failure to perform, negligent performance, or violation of any of its obligations under the contract. Note that the vendor may insist that a parallel provision be included in the contract requiring the grantee to indemnify the vendor for claims or losses caused by the CAP grantee.

13. Contract Term. The contract term, *i.e.*, the period of time during which the contract remains in effect, should be explicitly stated. Extensions should be permitted only upon mutual written consent of the parties.

14. Governing Law. If the grantee and the vendor are located in different states, it is important to specify which state's law governs the legal interpretation of the contract, and where it will be enforced. Typically, it is preferable to provide that the grantee's state law governs and, of equal importance, that disputes between the parties regarding the contract may be brought only in that state. If nothing else, local law and procedure will be more familiar to the grantee's counsel. Since the vendor has a similar interest in having the law of its home state apply and in ensuring that all disputes are handled close to the vendor's "home" (venue), the choice of law provision may require some negotiation (and ultimately the parties may not be able to agree on a venue provision). It also is advisable to include a "boilerplate" provision in the contract making it subject to all applicable federal statutes and regulations.

15. Assignment. Typically, purchasers expect that the vendor selected to perform a contract will, in fact, be the party that will perform the contract's terms and obligations and not an unknown third party. For this reason, it is advisable to include a provision stating that the contract cannot be assigned, *i.e.*, transferred to another party, without the grantee's prior written consent. It also may be advisable to prohibit subcontracting without prior approval or, at a minimum, to require the vendor to disclose the identity of any subcontractor. If subcontracting is permitted, keep in mind that the federal procurement standards require that certain provisions be included in procurement contracts. Therefore, the grantee's contract with a vendor should specify that the vendor include those provisions in any subcontracts.

16. Entire Agreement (Integration Clause). The contract should state that the terms of the written document constitute the entire agreement between the parties and that no prior agreements or verbal communications have effect, *i.e.*, that all of the terms of the agreement have been integrated into one written document. This can avoid allegations that there were side agreements between the parties that modify the terms of the written contract. Similarly, the contract should provide that no amendment to the contract is valid unless it is in writing and signed by both parties. Finally, the contract also should state whether any or all of its provisions will remain in effect if one or more is found by a court to be invalid ("severability").

IV. SPECIAL CONSIDERATIONS RELEVANT TO PROCURING INFORMATION SYSTEMS TECHNOLOGY

Many CAP consortia have proposed to fulfill the CAP program's purpose of developing or strengthening integrated systems of care for the uninsured and underinsured by acquiring new and/or upgrading existing information systems ("IS") technology.[4] Procurement of IS technology is a complex undertaking made more so in the CAP context by the need to serve multiple health care providers of varying size, structure, and purpose. Because of this complexity, CAP consortia are urged to involve their own legal counsel, as well as information technology experts and financial advisors, *at the outset* of the procurement process. Early involvement will help ensure contractual terms favorable to the consortium and compliance with all applicable federal grant-related requirements. Identification of the critical issues at an early stage should also substantially reduce the time (and related expense) spent in negotiations and significantly minimize the potential risk of liability to the consortium and its members.

A. General Considerations Relevant to the Procurement of IS Technology

In addition to the procurement standards and recommendations discussed above, CAP grantees that seek to purchase IS equipment or services should consider the following:

[4] First round CAP grantees could not procure MIS systems without the approval of the CAP grant office. That restriction is not contained in second round grants. This discussion assumes that all required approvals have been obtained.

1. Bids and Proposals

- If procuring a "package" of IS equipment and services, a grantee holds significantly greater leverage in negotiating with potential contractors than if procuring equipment and services separately. Make the most of this leverage and negotiate aggressively to obtain favorable pricing, warranty, remedy and termination terms.

- Consider, as a negotiating strategy, including in the RFP or bid solicitation not only the pertinent technical/functional requirements but also favorable legal terms and requirements. If certain terms are included in the vendor's proposal or bid, the vendor cannot later claim them to be "non-negotiable."

2. Long-term Interests

- Treat your IS arrangements as long-term "marriages." The duration of the term of any IS contracts should match the consortium's expectations regarding how long it intends to use the IS equipment/services.

- Provide for adequate protection in the event that the vendor goes out of business or is acquired by a competitor. Grantees should be wary of "without cause" termination clauses that could give vendors an easy out, potentially leaving a CAP grantee and consortium without any operational information or support and without a legal remedy.

3. Warranties

Standard vendor agreements typically state that the IS software or other equipment is provided "AS IS" and disclaim any and all express or implied warranties.

- At a minimum, ensure inclusion of a warranty that states that the software or other equipment will conform to the specifications provided.

- Obtain copies of all manufacturer warranties or, at a minimum, ascertain the warranty period for each component of hardware from the manufacturer.

- Consider a maintenance agreement offered by the manufacturer, carefully taking into account the annual cost and scope of coverage. These agreements can be expensive, but they are advisable.

4. Customization

Purchasers often hire vendors to install and customize more or less "off the shelf" IS technology to match the purchaser's particular needs. Grantees looking to purchase customized systems should be sure to:

- Include a detailed statement of work in the contract that sets forth, with specificity, the duties of the vendor and a corresponding time schedule to protect the consortium against unanticipated problems and delays.
- Negotiate a favorable warranty. For procurements involving significant software or hardware customizations, the vendor should affirmatively and explicitly warrant that the customization is fit for the purposes agreed to by the parties in the specifications. All warranties should begin after the customization has been completed and all relevant products/systems have been operational on the purchaser's site for a reasonable test period (*i.e.*, the "go live" date).

- Reserve sufficient rights of recourse (*e.g.*, the right to withhold payment) against the vendor if important milestones are not achieved.

5. Indemnification

- Protect the financial interests of the consortium. At a minimum, a vendors should agree to indemnify and hold the purchaser harmless from any claims for infringement of copyright or other intellectual property-related claims (which can result in multi-million dollar damage awards) that may arise if the vendor does not own the rights or have valid licenses to use the software. This indemnification should be expressly excluded from any limitation of liability provision included in the vendor's contract.

- Require evidence of vendor insurance and carefully review the policies to ensure that copyright infringement claims are covered.

- If purchasing billing software, include an indemnity provision whereby the software provider agrees to indemnify the grantee and members of the consortium, if applicable, for violations of federal law (*i.e.*, the submission of false claims) caused by the software.

6. Remedies

- Ensure that the contract provides for reasonable and adequate remedies in the event that the vendor breaches the agreement or the equipment fails to perform as promised.

- If purchasing an integrated "package" of equipment and services requiring multiple agreements, incorporate into each agreement a provision that allows the grantee to terminate all of the agreements and obtain an appropriate refund for the entire "package."

7. Security Interest

CAP grantees may be required to grant the vendor a security interest in the equipment if the vendor is to be paid in installments or through a financing arrangement. As indicated above, the federal government retains a reversionary interest, *i.e.*, the right to direct the transfer or disposition of property acquired with federal grant funds if the property is no longer required or used for the grant-supported project. *See* 45 C.F.R. § 74.34; 45 C.F.R. § 92.32.

- Incorporate a provision into the procurement agreement that explicitly recognizes the reversionary interest of the federal government, *i.e.*, make the agreement (and any rights of the vendor) subject to the government's reversionary interest so that it takes precedence over the vendor's interest. In most cases, the government will agree to subordinate its interest to the interest of a lender if requested to do so.

- Watch for, and do not agree to, requirements that give the vendor a security interest in any assets other than the purchased equipment.

B. Considerations Relevant to Software Licensing Agreements

The purchase of software involves the purchase of the right, referred to as a "license," to use the software under the terms and conditions set forth in the software license agreement. Because the vendor retains significant control over the utility of the software package, both through the terms of the license agreement and through issuing corrections and upgrades, certain features of licensing agreements require particular attention.

1. Scope of License

- Ensure that the licensed software will meet all of the consortium's current and foreseeable future needs by carefully negotiating a sufficiently broad "grant of license" clause. Grantees should also ensure that provisions regarding the designated sites/facilities where the software will be installed and used are adequately defined and consistent with the consortium's intended use of the software. If the consortium foresees the possible expansion of the software to additional sites, it should attempt to negotiate a discount or cap on future license fees.

- Ensure that the definition of the software includes basic enhancements, and/or updates of the licensed software, including updates required by changes in the law. Grantees will also want the definition of licensed software to include: (a) documentation or specifications containing representations of the software's abilities; (b) error corrections (for a reasonable period of time); and (c) if possible, major enhancements (*i.e.*, new or updated versions) of the software.

2. Remedies

- Consider a provision that allows the grantee, in the event of a breach by the vendor, to purchase or lease (at a reasonable price) the correct and updated version of the "source code" or "object code" (which is essentially the "key" to being able to use and repair the software) should the vendor cease conducting business or if the source code is withdrawn. A common method for implementing this provision is for the vendor and purchaser to enter into an escrow agreement that would give the purchaser access to the source code if certain triggering events occur. With the source code, a purchaser should be able to contract with a third party for maintenance and support services.

C. Considerations Relevant to Maintenance and Support Agreements

Frequently, vendors have a monopoly on maintenance and support services for their products. Accordingly, maintenance and support provisions should be negotiated *contemporaneously* with the license and/or hardware agreements when a purchaser enjoys its greatest bargaining power. In addition, the following issues should be considered when evaluating and negotiating the terms of maintenance and support agreements:

- **Support Commitment.** Does the agreements contain provisions addressing time frames for vendor response, on-call support services, correction procedures/protocols, assurance of qualified/certified maintenance personnel, and limitations and/or a cap on a vendor's travel expenses?

- **Covered Errors vs. Non-Covered Errors.** Grantees and members of the consortium, as applicable, should carefully review maintenance and support agreements. Are all costs for correcting covered errors the responsibility of the vendor? What is the process for determining whether an error is covered or non-covered? Is there a fair, and preferably informal, dispute resolution mechanism for quickly resolving disputes related to such determinations?

- **Price Increases.** If maintenance and support fees are increased to unreasonable levels, a purchaser may face serious financial risk if suitable replacement services can not be obtained from a third party. Does the agreement cap or otherwise the amount that maintenance and support fees can be increased each year?

VII. CONCLUSION

The procurement of goods and services and, in particular, IS technology, can be an extremely complex undertaking. CAP consortia can significantly reduce unnecessary risks by conducting sound procurements in a manner consistent with the federal procurement

requirements and by negotiating customized IS agreements with a focus on protecting the long-term interests of the consortium.